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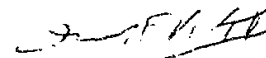
Lawrence Noble, Esq.  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: MUR's 4317, 4323

Dear Mr. Noble:

Enclosed please find our response to the General Counsel's Brief. Thank you for your attention to this matter.

Sincerely,



Donald F. McGahn II

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

THE HUCKABEE ELECTION  
COMMITTEE (SENATE COMMITTEE),  
PRISSY HICKERSON, AS TREASURER,  
THE HUCKABEE ELECTION COMMITTEE  
(STATE COMMITTEE), PRISSY HICKERSON,  
AS TREASURER, AND THE HONORABLE  
MIKE HUCKABEE

MURs 4317, 4323

RESPONSE TO GENERAL COUNSEL'S BRIEF

The Huckabee Election Committee, Prissy Hickerson as Treasurer (the "Senate Committee"), the Huckabee Election Committee, Prissy Hickerson as Treasurer (the "State Committee"), and the Honorable Mike Huckabee, by and through the undersigned counsel, respectfully reply to the General Counsel's Brief in the above-referenced Matters Under Review, and request that the Commission take no further action in these matters.

I. BACKGROUND

These MURs were filed by the Democratic Senatorial Campaign Committee and political opponents of the Governor of Arkansas, Mike Huckabee. In fact, the complaint in MUR 4323 included the exact same allegations contained in the complaint in MUR 4317, and drudged up reporting issues stemming as far back as Governor Huckabee's 1992 Senate campaign. The Commission found Reason to Believe with respect to both MURs.

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MUR 4317 concerns the reporting of three contributions totaling \$2,000. These contributions have been refunded, and have been properly reported to the Commission. With respect to the first \$1,000 contribution, the Committee believed that it was a contribution from a political action committee, unaware at the time of receipt that it was actually a corporate contribution. Once the Committee learned that it was in fact a corporate contribution, it refunded the contribution promptly and voluntarily. With respect to the other two contributions of \$500 each, such contributions were lawful, having come from permissible sources. Unfortunately, due to incorrect information provided by the contributors, these contributions were unintentionally misreported as coming from individuals, instead of from a partnership.

At issue in MUR 4323 is the General Counsel's novel theory of "testing the waters," which includes both the misunderstandings of the facts, and factual concessions which vitiate the factual underpinnings of the claimed violations. The General Counsel takes issue with a mailing that was both a debt retirement letter for the State Committee, and an issues survey concerning pertinent Arkansas state issues. The General Counsel asserts that language contained in a portion of one question of the issues survey converts the entire mailing to testing the waters as a matter of law, notwithstanding that the applicable Commission regulation focuses on the purpose of such an activity. Also at issue is a trip taken by the then-Lieutenant Governor Huckabee and his staff to Washington, D.C., to discuss the settlement of a debt of his State Committee. Because Governor Huckabee paid courtesy visits to others while in Washington, including the NRSC, the General Counsel views the trip as a testing the waters activity. Finally, the General Counsel's Brief includes a

lengthy discussion of what it claims are "other activities" which, by its own language, do not establish the existence of testing the waters activity.

## II. ANALYSIS

### A. MUR 4317

At issue are three contributions totaling \$2,000, which have long-since been refunded by the Committee and accurately reported to the Commission. Although the General Counsel's Office has investigated this matter (the Commission made its initial Reason to Believe finding over two years ago), the General Counsel's Brief fails to rebut, let alone explain away, material facts which demonstrate that Respondents activities were lawful, and thus not requiring further Commission action.

#### 1. The Delta Beverage Group Contribution Was Refunded.

The General Counsel's Brief asserts that the Committee failed to refund the Delta Beverage Group contribution at issue "within the thirty day period provided at 11 C.F.R. § 103.3(b)(1)," focusing exclusively on the date the contribution was received. Uncontested, though, are facts which dictate an application of section 103.3(b)(2). That section states in pertinent part:

If the treasurer in exercising his or her responsibilities under 11 CFR 103.3(b) determined that at the time a contribution was received and deposited, it did not appear to be made by a corporation, . . . but later discovers that it is illegal based on new evidence not available to the political committee at the time of receipt and deposit, the treasurer shall refund the contribution to the contributor within thirty days of the date on which the illegality is discovered.

11 C.F.R. § 103.3(b)(2).

The General Counsel's Brief concedes that the Committee believed the contribution to be lawful and non-corporate at the time of receipt, *i.e.*, from the political action committee of Delta Beverage, as opposed to from the entity itself. G.C. Brief at 2 (the Committee "mistakenly assumed that the contributor was a political action committee"). Nor does the Brief dispute that "[w]hen it came to the Committee's attention months later that [the] Delta Beverage check was not from its

political action committee, but rather from the corporation, the contribution was refunded promptly and voluntarily in the spirit of full compliance with the Act." Respondents' Response at 3 (12/20/96). Such undisputed factual predicates dictate an application of section 103.3(b)(2), and preclude the General Counsel's suggested application of the more restrictive section 103.3(b)(1). Accordingly, this allegation does not warrant further Commission action.

## **2. The Two Remaining Contributions Have Been Properly Reported.**

The General Counsel's Brief also takes issue with two contributions of \$500, asserting that the Committee "mis-reported" the source of the funds. All agree that the contributions were lawful. G.C. Brief at 2-3. Nor is there any dispute that the funds came from permissible sources. *Id.*

Instead, the Brief takes issue with the reporting of these contributions, a position contradicted by the record. The General Counsel's Brief concedes that the so-called "mis-reporting" occurred due to the Committee's receipt of incorrect information from the contributors. *Id.* Nor is there any issue that the Committee obtained such information by way of its own inquiries, and that such information was "included in amendments to its reports." G.C. Brief at 3. The General Counsel's recommendation completely ignores such undisputed facts. Accordingly, the Commission ought not take further action with respect to this matter.

### **B. MUR 4323**

#### **1. The Letter and Questionnaire Were Not Testing the Waters.**

The General Counsel's Brief is nothing more than a rehash of the prior Factual and Legal Analysis, including the inaccurate factual predicates that previously made conciliation impossible. Absent from the Brief's analysis are any new facts unearthed during the investigation which support the previous inaccurate assertions of the General Counsel. Undaunted by a lack of factual support, the Brief asserts in conclusory fashion that the mailing at issue constituted testing the waters activity as a matter of law. Such an assertion continues to be devoid of any factual or legal support.

The Brief concedes that the State Committee's May, 1995 letter at issue "included no express reference to a prospective federal campaign." G.C. Brief at 4. Nor does it challenge the fact that its purpose was debt reduction for then-Lieutenant Governor Huckabee's 1994 state campaign. *Id.* ("The State Committee's May, 1995 letter contained an appeal for funds to repay debts remaining from Mr. Huckabee's 1994 campaign for the office of Lieutenant Governor of Arkansas.").

Notwithstanding these undisputed facts, the General Counsel's Brief attempts to ignore the vast bulk of the mailing by isolating one small part of one question. This assertion that the mailing constituted testing the waters is based solely upon a portion of one question of a multi-question survey of Arkansas state issues included in the mailing. Prominently displaying the Arkansas state flag at the top, the survey itself consisted of ten questions on issues such as school consolidation, highway taxes, sales taxes on food, an informed consent law, welfare system reform, the death penalty, the just-then announced retirement of Senator Pryor, drunk driving laws, and certain amendments to the Arkansas Constitution. Respondents' Response at 3 (4/22/96) (*citing* Turner Affidavit ¶¶ 4-5). The Brief does not dispute that the purpose of the questionnaire was to allow then-Lieutenant Governor Huckabee to gauge his constituents' views on a number of issues relevant to the State's citizens at the time. *Id.* Nor does it dispute that all these issues were pertinent to then-Lieutenant Governor and current Governor of Arkansas Huckabee. *Id.* at 6. Nor could it, since all the other issues had been before the Arkansas legislature, and Senator Pryor's announcement just days before the mailing attracted a high level of media and citizen attention. Respondents' Response at 3 (4/22/96).

Instead, the General Counsel's Brief asserts without any citation to legal authority that the question regarding the retirement of Senator Pryor is "a classic testing-the-waters question" as a matter of law. The General Counsel has not cited any authority for this proposition because there is none. First, Commission Advisory Opinions dealing with testing the waters issues are all predicated

on the respective committee's purpose in engaging in the activity at issue. See Advisory Opinion ("AO") 1981-32; AO 1982-3; AO 1982-19; AO 1985-40. Here, the General Counsel now wishes to ignore the purpose for the May, 1995 mailing (debt retirement and constituent views on state issues), and instead foist upon the Commission a previously unrecognized rule.

Further, existing regulations reject such a per se view, and instead focus on the purpose of the activity. 11 C.F.R. §§ 100.7(b)(1)(i), 100.8(b)(1)(i) ("... solely for the purpose ..."). Factually, no one disputes the purpose of the activity was not testing the waters. G.C. Brief at 4. Neither the letter nor the survey ever advocated the election or defeat of then-Lieutenant Governor Huckabee as a Senate candidate, or solicited money for such a campaign in any way. Nor do the General Counsel's assumptions regarding the "federal and non-federal implications" of issues such as highway taxes and welfare reform convert the mailing into testing the waters activity.

Ultimately, all that is left is the General Counsel's unsupported characterization of a portion of one question as a "classic testing the waters question." Such a so-called "classic" question is not so defined by any statute, Commission regulation, judicial opinion, or other Commission rulings. Instead, the General Counsel's recommendation is nothing more than an attempt to regulate *via* the enforcement process, where a high-ranking state official's efforts to ascertain the views of his constituents on pressing state issues can somehow be converting into testing the waters activity subject to the Commission's authority. Such efforts are improper, and do not warrant further Commission action.

## **2. The Trip to Washington, D.C. Was to Retire State Committee Debt.**

The General Counsel's Brief does not dispute that the Washington, D.C. trip at issue "was for the sole purpose of meeting with political consultant Richard Morris to discuss an outstanding debt for services provided during the 1994 Lt. Governor's race." G.C. Brief at 7. Nor does the Brief dispute that this meeting occurred in Washington, D.C. "as a convenient alternative site only

after certain political realities made it difficult for Morris to travel to Arkansas, thereby precluding any possibility of a pre-meditated 'testing-the-waters' outing." *Id.*

Notwithstanding these dispositive facts, the General Counsel's Brief ignores the purpose of the trip, and instead characterizes the trip as testing the waters, based on nothing more than speculation. The Brief fails to elaborate or otherwise explain why a courtesy visit to the NRSC converts the trip into a testing the waters activity. Equally mysterious is the Brief's reliance on the Senate Committee's subsequent formation. The Brief fails to support such conspiratorial speculation, itself based upon inference.

Perhaps most disingenuous is the Brief's accusation of a "lack of specificity" in Respondents' replies concerning the subject matter of the visits. At no time did the General Counsel's Office ever request, whether through written question or document request, a detailed account of these visits. In fact, Respondents have responded to all discovery requests propounded by the General Counsel's Office, and have voluntarily provided additional information under oath. Thus, the General Counsel's Office cannot now draw an adverse inference from Respondents' so-called "lack of specificity;" the General Counsel Office's lack of evidence is due solely to the Office's inability to substantiate its conspiracy theory. Accordingly, further Commission action is not warranted.

### 3. So-Called "Other Activities" Were Not Testing the Waters.

By its own language, the General Counsel's Brief concedes that so-called "other activities" do not establish the existence of probable cause, admitting that "evidence gathered during the investigation with regard to [Governor] Huckabee's in-state travel . . . has thus far shown only minimal testing-the-water [*sic*] appearances," G.C. Brief at 13, and that the General Counsel can only establish "an approximate picture of the State Committee's financial activity," *id.* at 10.



Notwithstanding an admitted lack of probable cause, the General Counsel's Brief nonetheless includes several tangential discussions, the inclusion of which could only be intended to bias the Commission and prejudice the Respondents. For example, the Brief contains a lengthy polemic on an Arkansas Ethics Commission Report, but yet concludes that the travel at issue involved "various trips to stay in touch with constituents and attend various Arkansas Republican Party events, none of which were fundraisers or federal campaign-related events." G.C. Brief at 10-11.

Similarly, the Brief makes much of the "investigation" of this matter, in which the General Counsel's Office expended valuable Commission resources to send an investigator to Arkansas merely to look for "local press accounts of Huckabee appearances/speeches at specific local events . . ." *Id.* at 11. Not surprisingly, this "investigation" produced nothing in the way of admissible evidence, instead yielding only one news story which even arguably is related to the current matter. *Id.* at 12-13. That one instance (based solely on news articles, not testimony or documentary evidence) concerned a visit by then-Lieutenant Governor Huckabee to an Arkansas high school. Even assuming *arguendo* that the news articles are true and that the Lieutenant Governor mentioned his thoughts about the Senate race, such a statement was made in a high school to an audience which was not even old enough to vote.

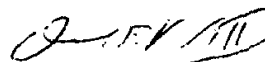
The absurdity of such a position is readily apparent, and is not masked by the Brief's misleading statement that Governor "Huckabee apparently discussed before a crowd of people [which in reality were high school students] the possibility of his entering the 1996 Senate race." Nor does the alleged June, 1995 letter constitute testing the waters, notwithstanding the Brief's conclusory characterization of this as "clear." G.C. Brief at 13. Once again this claim is based entirely on newspaper articles. Such articles, although perhaps sufficient to support a Reason to

Believe finding in certain instances, do not establish the existence of probable cause. Accordingly, the Commission should not take further action.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission take no further action in MURs 4317 and 4323.

Respectfully submitted,



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